(3)

No. 00-1858

Supreme Court, U.S.
FILED
SEP 10 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

J. ALEX COTA,

Petitioner,

v.

DAVID SIMONTON, *THE DOCKET*, an unincorporated association, SUSAN WESTERBERG PRAGER and BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

REPLY TO BRIEF IN OPPOSITION TO PETITION

ALEX COTA
Petitioner in Pro Per
P.O. Box 24352
Los Angeles, CA 90024
Telephone 310/474-1672

11 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reasons for Granting the Writ 1

A. Petitioner Raises Considerable Federal Questions and All Are Worthy of This Court's Review 1

B. Despite the Respondents' Claim Otherwise, Petitioner Did Not Waive Any Constitutional Challenge of the California Anti-SLAPP Statute 2

Conclusion 7

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Delaware v. Prouse, 440 U.S. 648 (1979) 6

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)..... 2

Long v. Michigan, 463 U.S. 1032 (1983).....5, 7

New York Times v. Sullivan, 376 U.S. 254 (1964) 2

Street v. New York, 394 U.S. 576 (1969) 7

Taylor v. Kentucky, 436 U.S. 478 (1978)..... 3

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 6

STATE COURT CASE

Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal.App.4th 855 (1995)..... 3

STATE STATUTES

California Code of Civil Procedure, § 425.16 .... 1, 4, 6

I. REASON FOR GRANTING THE WRIT

Due to the Respondent's erroneous contentions that Petitioner failed to raise a federal question worthy of review and allegedly waived any constitutional challenge to the California Anti-SLAPP statute, Petitioner hereby submits the following additional points and authorities:

A. Petitioner raises considerable federal questions and all are important and are worthy of this Court's review.

The Respondents claim that the petitioner raises no federal questions worthy of this Court's review. In truth and in fact, the Petition raises multiple federal questions and all are worthy of review. First, California Code of Civil Procedure § 425.16 on its face requires the state courts to consider Constitutional First Amendment principles and, as such, Respondent cannot maintain an argument that the statute alone creates an adequate and independent state ground for the dismissal.[1] Secondly, the fact that the lower court refused Petitioner's request for discovery despite his counsel's argument that such a denial would result in unfair and immediate dismissal under the California statute, implicates Due Process rights of the Petitioner and the subsequent constitutionality of the statute's application to the Petitioner.

---

[1] California Code of Civil Procedure, § 425.16(b)(1). "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike. . . . "

Thirdly, the California Court of Appeals clearly determined the Petitioner to be a limited purpose public figure based upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *New York Times v. Sullivan*, 376 U.S. 254 (1964).[2] Therefore, the California courts' own application of the statute supports the argument that the statute invokes a federal question surrounding First Amendment principles. Finally, there is a federal question by virtue of the principles enunciated in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) discussed in the Petition.

B. Despite the Respondents' claim otherwise, Petitioner did not waive any constitutional challenge of the California Anti-SLAPP statute.

Although Respondents state in their Opposition to Petition for Writ of Certiorari that Petitioner "does not explain what prevented him from arguing in response to the motion that the state's limits on discovery violated his constitutional rights,"[3] the contention of the Petitioner is not that the statute is unconstitutional on its face. Rather, Petitioner's contention is based upon the fact that the request for discovery, properly raised in the California Superior Court, was denied. This denial of the discovery request (and to a lesser extent, imposition of attorneys fees) is the basis for Petitioner's claim that his due process rights were violated. Had the lower court held in keeping with the instruction given by the California

---

[2] Pet. App. 14-15.

[3] Brief in Opposition 10.

Court of Appeals,[4] discovery would have been granted and no constitutional challenge would have been necessary or appropriate.

Furthermore, this Court has found previously that an objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles."[5] Notice of the Due Process argument presented by Petitioner's counsel was given when he requested discovery and stated that its denial would be "[l]ike a Blitzkrieg that destroys us. I don't mean that in a personal matter, but the legal effect is to wipe us out entirely."[6] Petitioner made such a showing by stating "[t]his will provide the Court with information on malice, the relationship of the defendants, and other significant matters, including the circumstances under which the challenged article was prepared."[7] Finally, Petitioner's counsel spoke specifically to the constitutional right of the Petitioner to redress his grievances and First Amendment considerations versus the right of an individual to assert defamation claims.[8]

---

[4] *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* 37 Cal.App.4th 855, 867-868 (1995). The court stated that the opportunity for discovery "is of prime import in a libel suit against a media defendant who will generally be the principle, if not the only, source of evidence" needed to determine libel.

[5] *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978).

[6] Pet. App. 112.

[7] Pet. App. 84.

[8] Pet. App. 104; Petitioner also argued at both a hearing on his Motion for Reconsideration and a hearing on defendants' Motion for Attorney Fees in the trial court that the application of the statute deprived him of his constitutional rights.

Since the lower court denied discovery,[9] the Petitioner properly raised the unconstitutionality of this action in his appeal. Although the actual language of the appeal did not specifically refer to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, it did contain and provide the court of appeals with proper notice of the Petitioner's reliance on constitutional principles.

In addition, the language of California Code of Civil Procedure section 425.16 on its face specifically refers to an "act in furtherance of person's right of petition or free speech under United States or California Constitution in connection with a public figure."[10] The statute in question clearly invokes a Constitutional question which this court has appropriate jurisdiction to review.

It is ironic that opposing counsel begins their Brief in Opposition to Petition for Writ of Certiorari by explaining the purpose of California's Anti-SLAPP statute, including its attempt to protect constitutional rights,[11] but then attempts to claim that no important federal question exists which merits this Court's review. Opposing counsel conveniently sidesteps the true effect of the statute on Petitioner's right to due process and right to redress grievances, and instead switches its focus simply to the argument that the article was not libelous.

Lastly, Respondents claim that this court lacks jurisdiction because the California Court of Appeals decision

---

[9] Pet. App. 112-114.

[10] Pet. App. 2.

[11] Brief in Opposition 1.

rests on the adequate and independent state ground that the statements about Mr. Cota were not defamatory. This is simply incorrect. The record clearly reflects that both the Superior Court[12] and the California Court of Appeals[13] were aware of and considered the issue of the Petitioner's status as a limited purpose public figure. In fact, the California Court of Appeals, in its determination, defined a limited purpose public figure and the effect of such a determination on the standard of proof that must be then proven in a libel case. For the Respondents to suggest that the California Court of Appeals included in their decision a finding that Petitioner was a limited purpose public figure but did not base its determination on this seems incredible especially in light of Respondents' numerous attempts to have the Petitioner deemed as such in their memoranda to the courts.

Respondents chose to cite *Long v. Michigan* in support of their contention that the state court's decision rests on an adequate and independent state ground. However, the *Long* case actually stands for the rule that jurisdiction exists "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."[14] The court further explained the presumption in favor of Petitioner herein by stating:

---

[12] See Plaintiff's Opposition to Motion to Strike Pet. App. 82.

[13] Pet. App. 15.

[14] *Long v. Michigan*, 463 U.S. 1032, 1042 (1983).

> "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved."[15]

Furthermore, this Court had previously stated in *Zacchini v. Scripps-Howard Broadcasting Co.* that the Court took jurisdiction because "at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did."[16] California Code of Civil Procedure, § 425.16 requires by its language that the state courts take into consideration its purpose of protecting "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[17] Therefore, like *Zacchini*, the state court was compelled to

---

[15] *Id.* at 1040-41.

[16] *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). *See also, Delaware v. Prouse*, 440 U.S. 648 (1979).

[17] California Code of Civil Procedure, § 425.16.

base any decision on federal constitutional considerations.

Petitioner continues to assert that the decision was based on the California courts understanding of the Anti-SLAPP statute which on its face requires the court to invoke First Amendment principles as previously defined by this Court. Therefore, as in *Long*, jurisdiction is proper since it is the most reasonable explanation for the decision to assume that the court relied on its understanding of First Amendment precedence as it is required to do by the language of California's Anti-SLAPP statute.

The California Court of Appeals in its decision refused to decide the constitutional challenge to the Anti-SLAPP statute as improperly raised in the superior court. However, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound" by the state court decision.[18] Therefore, if this Court determines that a federal question was raised in the state courts (which it clearly was), jurisdiction is proper.

CONCLUSION

This Court should grant the Petitioner's petition for writ of certiorari for the reasons explained above.

1. This Court has jurisdiction to review the Court of Appeal's ruling because the decision did not rest on

[18] *Street v. New York*, 394 U.S. 576, 583 (1969).

adequate and independent state grounds since the anti-SLAPP statute clearly requires constitutional analysis in its application.

2. The constitutionality of the anti-SLAPP statute was pressed upon in the Superior Court and the Court of Appeals was incorrect in its decision to the contrary.

3. The Court of Appeals based its decision in whole or in part on an initial determination that the Petitioner was a limited purpose public figure and therefore invokes a federal question of great importance in light of the varying tests in application today through various federal and state courts as explained in the initial petition.

Respectfully submitted,

ALEX COTA
Petitioner in Pro Per
P.O. Box 24352
Los Angeles, CA 90024
Telephone 310/474-1672